No. 92-1168

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

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TERESA HARRIS,

Petitioner,

vs.

FORKLIFT SYSTEMS, INC.,

Respondent.

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On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF OF AMICUS CURIAE FEMINISTS FOR FREE EXPRESSION IN SUPPORT OF PETITIONER

-------*-------

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INTEREST OF THE AMICUS

Feminists for Free Expression (FFE) is an organization of diverse feminist women who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view, and produce media materials of her or his choice, without the intervention of the government "for our own good."

Originally organized in January 1992 in opposition to the then-pending Pornography Victims Compensation Act (S. 1521), FFE gained national recognition for its role in defeating that proposed legislation. FFE's letter to the Senate Judiciary Committee protesting the censorial provisions of the bill was signed by over 200 prominent women authors, activists, attorneys and scholars including Betty Friedan,

Adrienne Rich, Nadine Strossen, Erica Jong, Nora Ephron, Jamaica Kincaid, and Judy Blume.

The list of signatories to the FFE letter included many artists and writers who have felt the sting of censorship in recent years: Judy Blume, whose insightful and compassionate books for adolescents have won wide acclaim but have also spawned such controversy that she has recently been deemed the "most censored author in America"; Erica Jong, whose frank treatment of women's sexuality in her best-selling novels has likewise drawn fire; Karen Finley and Holly Hughes, feminist playwrights and actresses whose NEA grants were improperly denied for political reasons, as a federal court recently concluded in an exceptional decision ordering that their grants be restored. *See Finley v. National Endowment for the Arts*, 795 F. Supp. 1457 (C.D. Cal. 1992).

Since its role in the defeat of S. 1521, FFE has undertaken numerous other projects in defense of free speech rights, including its amicus brief in *Alexander v. United States*, currently pending before this Court. FFE has

also become prominently involved with issues arising from Title VII-inspired regulations of speech and access to expressive materials in the workplace, as in the pending challenge to the Los Angeles County Fire Department's prohibitions extending to firefighters' mere possession of sexually-oriented materials.

FFE's participation in these cases is motivated by a conviction that the rights of free expression are both indivisible and of crucial importance to feminists and to women generally. As many of FFE's artistic and literary members can attest, feminist expression is inherently controversial. Just as some would scapegoat erotic speech generally for a wide variety of social ills, feminist ideas have increasingly been blamed for social problems ranging from male unemployment to teenage pregnancy and "the decline of family values." Indeed, any written or visual work which deals frankly with women's lives and sexuality is at

risk in a climate of pervasive censorship.[1] Because the freedom to put forth controversial feminist ideas and to combat ignorance regarding sexuality is so essential to women's rights and well-being, FFE believes that it is particularly incumbent upon women to oppose censorship initiatives, including the disturbing trend toward overly-intrusive workplace regulations under the aegis of compliance with Title VII.

Although FFE strongly supports meritorious Title VII claims by workers (male and female) who have been subjected to discriminatory workplace harassment, the potential clash with First Amendment interests urgently requires that this area of the law be re-thought and clarified, if important free speech interests are not to be swept away in an impulsive tide of "politically correct" over-regulation.

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[1] Works which have been officially or unofficially censored over the past few years include *The Diary of Anne Frank*, *Our Bodies, Ourselves*, Orwell's *1984*, Desmond Morris' *The Naked Ape*, Alice Walker's *The Color Purple*, and films such as *Romeo and Juliet*, *Victor/Victoria*, and *A Passage to India*. *See* Marcia Pally, *Sense and Censorship: The Vanity of Bonfires* at 5-8 (Americans for Constitutional Freedom and Freedom to Read Foundation 1991).

FFE is particularly concerned with the misplaced, almost exclusive emphasis on sexuality as the focus of this regulation, as opposed to a proper focus on *harassment* whatever form it may take. The undue anti-sexual emphasis, particularly when coupled with a standard of "offensiveness," entails unspoken and counter-productive assumptions about women -- that women are indeed the "weaker sex" and cannot survive in the workplace unless it is cleansed of all banter or expression about sexuality. These assumptions fundamentally disserve women, perpetuating gender-based stereotypes of both men and women, but particularly of women as fragile, asexual beings whose delicate sensibilities require special protection. Moreover, the specter of paternalistic over-regulation of every nuance of interpersonal relations fosters a climate of mutual distrust and resentment between male and female co-workers, rather than an environment in which women and men can work constructively toward common understanding and equality.

For these reasons, FFE urges this Court to re-evaluate the "hostile work environment" theory, and particularly to make critical distinctions between very different sorts of workplace conduct and expression which may be alleged to be discriminatory under Title VII. For example, harassment targeting an individual worker, as alleged in this case, differs enormously from the mere possession or display of political or sexual material a co-worker might find "offensive," and to prohibit the latter as "harassment" comports with neither common sense, the statutory purpose, nor the First Amendment. FFE urges this Court to distinguish sharply between these qualitatively different bases for Title VII claims, to reject the criterion of mere "offensiveness," and to adopt a standard which focuses not on the plaintiff's subjective reactions to the conduct or expression involved, but rather on the harmfulness of repeated or pervasive harassing conduct which has demonstrably hindered an employee in his or her work performance. Such an approach would allow employers to formulate

reasonable workplace standards of conduct -- standards which can protect employees from discriminatory harassment without unconstitutionally attempting to cleanse of all controversy the workplaces which occupy such a central place in the life experience of most American adults.

The current "hostile work environment" standards spawn unduly censorial regulations and thus violate the First Amendment; they are, moreover, alternately over- or under-protective with respect to valid claims of discriminatory harassment. Because feminist speech is especially vulnerable to the same censorial pressures, FFE submits this brief as *amicus curiae* in an attempt to assist this Court in formulating appropriate standards which will at once protect all workers from invidious harassment while also maintaining due regard for our society's fundamental values of pluralism and free expression.

Also, EEAC has advised the Equal Employment Opportunity Commission (EEOC) on a formal and informal basis, including the filing of comments on EEOC's Interim Interpretive Guidelines on Sexual Harassment, published at 29 C.F.R. § 1604.11 (1980). Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case.

EEAC seeks to assist the Court in this case by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of its substantial experience in these matters, EEAC is uniquely situated to brief this Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Petitioner Teresa Harris was employed as a Rental Manager by Respondent Forklift Systems, Inc. ("Forklift") from April 22, 1985 until she quit on

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for sexual harassment); *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd of Teamsters*, 969 F.2d 1436 (3d Cir.), *cert. denied*, 113 S. Ct. 660 (1992) (overturning arbitration award reinstating employee terminated for sexual harassment); *Stockstill v. Shell Oil Co.*, No. 92-3415 (5th Cir.) (decision pending) (defamation suit based on employer's response to government investigator's inquiry); *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992) (addressing the effect of an employer's prompt and effective response to a complaint of sexual harassment); and *Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466 (11th Cir. 1991) (age discrimination claim by employee terminated for sexual harassment).

October 1, 1987. Pet. App. A-8.[2] A few days after she left, Mrs. Harris filed a charge of sexual harassment against Forklift with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and later a suit in federal court. The case was tried before a magistrate in July 1990. Pet. App. A-6.

The magistrate concluded that Forklift's president, Charles Hardy, had made sex- and gender-based comments, some of which offended Mrs. Harris and would have offended a reasonable woman. Pet. App. A-33. Nevertheless, the magistrate determined, the conduct was insufficient to constitute a "hostile environment" under Title VII. Pet. App. A-26.

Although agreeing that Mr. Hardy's remarks "may at times have genuinely offended plaintiff," Pet. App. A-35, the magistrate concluded that the comments "would not have risen to the level of interferring with [a reasonable woman manager's] work performance," Pet. App. A-34, nor did they "creat[e] a working environment so poisoned as to be intimidating or abusive to plaintiff." Pet. App. A-35. The magistrate also stated that he "[did] not believe they were so severe as to be expected to seriously affect plaintiff's psychological well-being." Pet. App. A-33-34.

The district court adopted the magistrate's recommendation, Pet. App. A-4. The Sixth Circuit affirmed *per curiam*. Pet. App. A-1.

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[2] References to the decision below, reproduced in the Appendix to the Petition for Writ of Certiorari, are designated at Pet. App. ——.

SUMMARY OF ARGUMENT

1. To prove a case of "hostile environment" sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, a plaintiff must show that the challenged conduct meets the standards enunciated by this Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986): that it is sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). This includes proof that the challenged conduct: (1) would have the aforesaid effect on a reasonable person in the position of the alleged victim; (2) indeed was "unwelcome" to the alleged victim; and (3) altered the conditions of employment and created an abusive working environment for the victim. Proof that the victim suffered psychological injury is an appropriate way of making the necessary showing of the effect on the victim.

2. Any standard enunciated by this Court for employer liability for sexual harassment should take into consideration anti-harassment policies and procedures established by employers in response to this Court's guidance in *Meritor*. Where an employer has adopted a strong company policy prohibiting workplace sexual harassment and has established an adequate procedure for addressing complaints, the employer cannot be liable for a supervisor's or employee's creation of a hostile environment of which the employer had no actual or constructive knowledge if the alleged victim failed to take advantage of that procedure or if the employer took prompt and appropriate action.

3. An employer must be able to take prompt and appropriate action to combat improper sexual behavior in the workplace without having to prove that the conduct is serious or pervasive enough to be actionable under Title VII. Under no circumstances should the employer be required to prove that the alleged victim suffered psychological harm as a result of the harasser's conduct. Indeed, if an anti-harassment policy and procedure are effective, potentially harassing conduct should surface and be dealt with *before* it reaches a truly critical level. Where an employer, after investigation, believes in good faith that inappropriate behavior has occurred, the employer must be able to take immediate action, including discipline or even discharge of the offender without facing legal action by the harasser.

ARGUMENT

I. ANY STANDARD ESTABLISHED BY THIS COURT FOR THE PLAINTIFF'S BURDEN IN A "HOSTILE ENVIRONMENT" SEXUAL HARASSMENT CASE SHOULD INCLUDE PROOF OF DETRIMENTAL EFFECT ON THE PLAINTIFF.

A. Actionable Sexual Harassment Is Unwelcome Sexual Advances, Requests for Sexual Favors, and Other Verbal or Physical Conduct of a Sexual Nature That Is Sufficiently Severe or Pervasive To Alter the Conditions of the Victim's Employment and Create an Abusive Working Environment.

The standards for dealing with sexual harassment claims are well-known and have been relied upon by the employer community in dealing with workplace harassment. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), this Court established the threshold for conduct that may be actionable sexual harassment under Title VII of the Civil Rights Act

of 1964, 42 U.S.C. § 2000e *et seq.* Although Title VII itself does not specifically mention "harassment," it does make it an unlawful employment practice, *inter alia*, for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). As this Court concluded in *Meritor*, "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Meritor*, 477 U.S. at 64 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)).

Accordingly, using the interpretive guidelines issued by the Equal Employment Opportunity Commission, the Court identified " '[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature' " as the type of workplace conduct that could constitute sexual harassment.[3] Finding that Title VII protects against more than economic harm, this Court ruled that such conduct may be actionable under Title VII "whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.' " [4]

In recognizing "hostile environment" sexual harassment, however, this Court noted that the parameters

[3] *Meritor*, 477 U.S. at 65 (alteration in original) (quoting 29 C.F.R. § 1604.11, hereinafter "EEOC Guidelines").

[4] *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a)).

of Title VII protection are limited by the statutory language from which the protection flows:

> [N]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII. . . . For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'

Id. at 67 (alteration in original) (citations omitted).[5]

Accordingly, only conduct meeting this standard will support Title VII liability. As the Fifth Circuit pointed out, "the absence of [a tangible economic] detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment." *Jones v. Flagship Int'l*, 793 F.2d 714, 720 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

In order to establish hostile environment sexual harassment, we submit that the plaintiff is required to prove that the challenged conduct: (1) would alter the conditions of employment and create an abusive working environment of a reasonable person in the position of the alleged victim; (2) indeed was shown to be "unwelcome" as indicated by the alleged victim's conduct, 477 U.S. at 68; and (3) altered the conditions of employment and created an abusive working environment for the victim.

[5] *See also Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (quoting *Meritor*).

B. Initially, a Plaintiff Must Prove Harassment From the Standpoint of a Reasonable Person in the Position of the Alleged Victim.

The courts of appeals consistently require plaintiffs in sexual harassment cases to show that the conduct complained of objectively meets this Court's minimum threshold—that is, whether a reasonable person in the position of the victim would have concluded that the challenged conduct created an intimidating, hostile or offensive working environment. *See, e.g., Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 566 (8th Cir. 1992) (finding conduct "sufficiently severe or pervasive" to affect a reasonable person and remanding for a finding of the effect on the plaintiff); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418 (7th Cir. 1989); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), *modified on other grounds*, 900 F.2d 27 (4th Cir. 1990). The Eleventh Circuit described the perspective from which the conduct should be viewed in a case of alleged harassment against a female plaintiff as that of a "reasonable woman." *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

An objective standard based upon a reasonable victim guards against unreasonable claims. "Title VII does not serve 'as a vehicle for vindicating the petty slights suffered by the hypersensitive.'" EEOC Policy Guidance on Current Issues of Sexual Harassment, No. N-915-050 (March 19, 1990) at 14 (reprinted at EEOC Compl. Man. (BNA) N:4031[6]

[6] Shortly after *Meritor* was decided, the EEOC issued policy guidance to its field staff. It was reissued in March 1990 without substantial change. EEOC Policy Guidance on Current Issues of Sexual Harassment, No. N-915.035 (October 25, 1988) (reprinted at EEOC Compl. Man. (BNA) N:4001).

(hereinafter EEOC Policy Guidance) (quoting *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984). The standard, according to the EEOC, should be used to determine both: (1) whether a reasonable person's work environment would have been affected substantially; and (2) whether a reasonable person would have considered the conduct to be sexual in nature. *Id.*

C. The Plaintiff's Conduct Must Have Indicated That The Conduct Was Unwelcome.

As the Court pointed out in *Meritor*, another key element of an actionable sexual harassment claim is a showing that the alleged victim "by her conduct indicated that the alleged sexual advances were unwelcome. . . ." *Meritor*, 477 U.S. at 68. Where it is unclear whether or not the conduct was unwelcome, the court must look to " 'the record as a whole' and 'the totality of circumstances.'" *Meritor* at 69 (quoting 29 C.F.R. § 1604.11(b)).

A plaintiff can prove that conduct was unwelcome by showing " 'that the employee did not solicit or incite it, and the employee regarded the conduct as undesirable or offensive.'" *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559 (8th Cir. 1992) (quoting *Hall v. Gus Constr. Co., Inc.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (quoting *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986)); EEOC Guidance at 7 (quoting *Henson v. City of Dundee*, 682 F.2d at 903 (11th Cir. 1982)).

D. The Plaintiff Must Show Some Detrimental Effect On the Terms and Conditions of Her Employment.

Once the plaintiff has shown that she or he was the victim of unwelcome sexual harassment that would have altered the conditions of employment for a reasonable person and created an abusive working environment, the plaintiff still must show that the conduct actually had that effect on her. As the Fourth Circuit explained, "the fact finder must examine the evidence both from an objective perspective and from the point of view of the victim." *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), *modified on other grounds*, 900 F.2d 27 (4th Cir. 1990). "The subjective factor is crucial because it demonstrates that the alleged conduct injured this particular plaintiff giving her a claim for judicial relief." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990).

Accordingly, "[o]nly if the court concludes that the conduct would adversely affect the work performance and the well-being of both a reasonable person and the particular plaintiff bringing the action may it find that the defendant has violated the plaintiff's rights under Title VII." *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989).[7]

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[7] One way to satisfy this requirement is to show that "the sexual harassment was sufficiently severe or persistent 'to affect seriously [the victim's] psychological well-being.'" *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 (11th Cir. 1987) (modification in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). *See also Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 193 (1st Cir. 1990) (noting that "district court was [not] clearly wrong in determining that the conduct was not of the type that would interfere with a reasonable person's work performance, *nor* would it seriously affect a reasonable person's psychological well-being, at least to the extent required by Title VII") (emphasis added). As the Sixth Circuit has explained:

> Assuming that the plaintiff satisfied the burden of proving that the defendant's conduct would have interfered with that reasonable individual's work performance and would have affected seriously the psychological well-being of that reasonable employee, the court is thereafter directed to determine if the plaintiff was actually offended by the defendant's conduct and suffered some degree of injury as a result of her exposure to the work environment.

Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 650 (6th Cir. 1986).

II. ANY STANDARD FOR EMPLOYER LIABILITY MUST TAKE INTO CONSIDERATION THE EMPLOYER'S ANTI-HARASSMENT POLICIES AND PROCEDURES.

A. An Employer Should Be Shielded From Liability Where the Employer Has Taken Prompt and Appropriate Action or Where the Plaintiff Fails To Take Advantage of an Expressed Policy Against Sexual Harassment and an Adequate Procedure for Resolving Claims.

1. *Strict Liability Does Not Apply In a Hostile Environment Context.*

This Court has refused to hold employers automatically liable for "hostile environment" harassment by supervisors. *Meritor*, 477 U.S. at 72. In *Meritor*, both parties sought to have the Court establish a standard for employer liability or nonliability in these situations. The plaintiff sought strict liability, arguing that Title VII's definition of "employer"

as including an "agent" [8] requires employer liability whenever a supervisory employee is involved in harassment in work-related circumstances. 477 U.S. at 70. The employer, on the contrary, contended that it could not be held liable for a supervisor's misconduct unless it had notice and failed to take action. *Id.*

In an *amicus curiae* brief, the EEOC departed from the harsh strict liability standard proposed in its 1980 Guidelines and suggested that application of "traditional agency principles" would be appropriate. *Id.* The EEOC explained that while agency principles generally lead to direct employer liability for a supervisor's actions in a *quid pro quo* case, hostile environment cases are different. There, the EEOC argued, agency principles require:

> a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantake of that procedure, *the employer should be shielded from liability* absent actual knowledge of the sexually hostile environment (obtained, *e.g.*, by the filing of a charge with the EEOC or a comparable state agency).

[8] Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, *and any agent of such a person* . . . ." 42 U.S.C. § 2000e(b) (emphasis added).

Brief for United States and EEOC as Amici Curiae in *Meritor* at 26 (quoted in *Meritor*, 477 U.S. at 71).

The Court agreed with the EEOC that "Congress wanted courts to look to agency principles for guidance in this area." *Meritor*, 477 U.S. at 72. Accordingly, the Court ruled that "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.*[9]

In *Meritor*, the Court encouraged employers to adopt effective anti-harassment policies. There, the employer argued that its policy against discrimination insulated it from liability. The Court disagreed in *Meritor* because the particular employer's general policy against discrimination "did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination." 477 U.S. at 72-73. Further, the Bank's policy "apparently required an employee to complain first to her supervisor" who, in *Meritor*, was the alleged harasser. 477 U.S. at 73. In rejecting the employer's defense, the Court stated:

> [The Bank's] contention that [the victim's] failure [to invoke the Bank's nondiscrimination procedure] should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

Id.[10]

[9] The majority's opinion thus can be read as rejecting the approach taken in the concurring opinion, which would have imposed a strict liability standard for hostile environment harassment by a supervisor. *Meritor*, 477 U.S. at 78 (Marshall, J., concurring).

[10] Justice Marshall's concurring opinion stated:

Based in part on reliance on this statement in *Meritor*, EEAC's members have adopted specific and effective anti-harassment policies. Should the Court go beyond the specific issue presented in this case and elaborate upon this part of the *Meritor* decision, EEAC sets forth the following principles for the Court's assistance.

2. *Based on the Application of Agency Principles, an Employer That Has an Expressed Policy Against Sexual Harassment and an Adequate Procedure For Resolving Claims Cannot Be Liable For a Supervisor's or Employee's Creation* of a Hostile Environment of Which the Employer Lacked Actual or Constructive Knowledge If the Plaintiff Failed to Take Advantage of the Procedure or If the Employer Takes Prompt and Appropriate Action.

This Court in *Meritor* declined to establish an explicit rule as to when employers *would* be liable, other than the application of agency principles, referring to §§ 219-237 of the Restatement (Second) of Agency (1958). 477 U.S. at 72. These sections of the Restatement, which address the liability of a master for torts committed by a servant, clearly do not hold an employer responsible for every act of every employee. The relevant portions of § 219(2) explain generally that a master is not liable for actions outside the scope of employment unless the employer was negligent or reckless, or the servant acted with apparent

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Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination and thus to award reinstatement or backpay.

477 U.S. at 78.

authority.[11] Outrageous or abnormal acts generally are not within the scope of employment. § 235 and comment c. Neither are acts that are unauthorized unless, as noted above, the servant acts with apparent authority. § 228.

The EEOC's Policy Guidance gives the agency's view on how these principles apply to hostile environment cases, using an analysis similar to the agency's *amicus curiae* brief in *Meritor*. The Guidance also takes into consideration the factors that this Court suggested as being minimum components for an adequate anti-harassment program: (1) a specific policy prohibiting sexual harassment; and (2) a procedure that is "calculated to encourage victims of harassment to come forward" including more than one avenue of complaint. *Meritor*, 477 U.S. at 72-73.

First, the EEOC explains that an employer may be directly liable for hostile environment harassment by a supervisor "[i]f actual or constructive knowledge exists, and if the employer failed to take immediate and appropriate corrective action . . . ." EEOC Pol-

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[11] Section 219 provides:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act to speak on behalf of the principal and there was reliance upon

icy Guidance at 23.[12] The employer who knows of a supervisor's harassing conduct and does not act, the EEOC contends, "by acquiescing, has brought the supervisor's actions within the scope of his employment." EEOC Policy Guidance at 25.

Next, the EEOC illustrates how an employer may be held liable for a supervisor's actions under agency principles even if the employer lacks actual or constructive notice. Under the theory of "apparent authority," the guidance states, an employer can be responsible if it lacks an effective anti-harassment policy and complaint procedure. According to the Commission, "in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management." EEOC Policy Guidance at 25.

Application of these principles compels a limitation of liability for an employer that *has* an expressed policy against harassment and an adequate procedure for resolving claims, where the alleged victim fails to bring the problem to the employer's attention. When

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apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency § 219 (1958).

[12] Notably, the agency also observes that "[t]his is the theory under which employers are liable for harassment by co-workers." While the agency has not revised its 1980 Guidelines, it clearly has abandoned the strict liability standard articulated at 29 C.F.R. § 1604.11(c) in accordance with the Court's holding in *Meritor* in favor of the standard at 29 C.F.R. § 1604.11(d) applicable to harassment by co-workers.

an employer has a well-disseminated anti-harassment policy, it cannot be directly liable for a supervisor's creation of a hostile environment absent evidence of actual or constructive knowledge of the supervisor's action. Since there will be no question that such conduct is unauthorized and indeed prohibited, it will be outside the scope of employment.

Likewise, the employer cannot be held responsible under an "apparent authority" theory. As the EEOC Policy Guidance states:

> an employer can divest its supervisors of this apparent authority [to create a hostile working environment] by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure. When employees know that recourse is available, they cannot reasonably believe that a harassing work environment is authorized or condoned by the employer. If an employee failed to use an effective, available complaint procedure, the employer may be able to prove the absence of apparent authority and thus the lack of an agency relationship, unless liability attaches under some other theory.

EEOC Policy Guidance at 26 (footnotes omitted).

Based on the guidance of this Court and the EEOC, employers such as EEAC's member companies have established clear and unequivocal policies forbidding sexual harassment in the workplace, and procedures for prompt and appropriate handling of complaints. These employers have put in practice the EEOC's strong recommendation that:

> [a]n effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to em-

> ployees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to 'encourage victims of harassment to come forward' and should not require a victim to complain first to the offending supervisor. *See Vinson*, 106 S. Ct. at 2408. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

EEOC Policy Guidance at 29.

When a defendant employer has in place a policy and procedure meeting these standards, allowing a Title VII recovery to a plaintiff who has failed to report harassing conduct is tantamount to strict liability. Where the affected employee does not make use of an anti-harassment policy, the employer has no reason to know that harassing behavior is occurring, assuming that there is no highly visible offensive conduct that would create constructive knowledge. Lacking such actual knowledge or any reason to know that unlawful conduct is occurring, the employer is unable to take steps to protect the victim from actions contrary to company policy. Yet, having set up an aggressive anti-harassment policy or procedure, the employer cannot be said to have acted negligently or recklessly. Restatement (Second) of Agency § 219(2)(b). An employer that has taken these precautions cannot be responsible under any theory if it does not know or have reason to know of the conduct and thus has no opportunity to take appropriate action.

As the EEOC's guidance suggests, a good procedure encourages employees to report incidents of harassment, and includes methods to bypass the direct supervisor if that person is also the harasser. Without the alleged victim's cooperation, even the finest anti-harassment policy is useless.

A plaintiff's refusal to make use of an available recourse that could have remedied the situation must negate any employer liability. Even the most conscientious, enlightened employer cannot control every day-to-day action of every employee, and must know of harassing behavior before it can take action to halt it. Holding such an employer liable for the actions of an employee that violate an express company policy when the employer did not know, and did not have reason to know of the offensive conduct, unfairly makes that employer a "deep pocket" liable for a situation over which it had no control.

Finally, prompt and effective action by an employer who *is* informed of harassing behavior likewise should obviate liability. An employer who can show that, upon learning that harassment has occurred, it conducted a thorough and *bona fide* investigation, reached a rational conclusion and took appropriate action, should be credited for those efforts. Indeed, the EEOC has strongly supported such actions. The agency's Guidelines take the position that employers who take "immediate and appropriate" corrective action are not liable for the acts of co-employees. 29 C.F.R. § 1604.11(d). This reasoning should apply as well to conduct of a supervisor that is unauthorized and contrary to company policy. Accordingly, federal courts since *Meritor* have based

their decisions on these factors.[13] Thus, if an employer can demonstrate that it made a substantial effort to prevent the existence of a "hostile environment" it may be insulated from liability.

B. An Employer Should Be Able To Take Action Against A Harasser Without The Necessity of Proving that the Alleged Victim Suffered Psychological Harm. Moreover, an Employer's Good Faith in Investigating a Harassment Claim Should Protect The Employer From Legal Action by the Harasser.

In order for anti-harassment policies and programs to be effective, employers need considerable latitude in taking prompt and appropriate action against an accused harasser. In particular, an employer should not be required to prove that the accuser suffered "psychological harm" to justify its action against the harasser.

As noted above, prompt and appropriate employer action upon receipt of a complaint is a key component of an effective anti-harassment program. All too often, however, disciplinary action by the employer is met with resistance, if not legal action, by the accused harasser. *See generally* Hope A. Comisky, " 'Prompt and Effective Remedial Action?' What

[13] *See, e.g., Swentek v. US Air, Inc.*, 830 F.2d 552 (4th Cir. 1987) (employer not liable for "hostile environment" sexual harassment under Title VII when it took immediate action, including investigation and discipline, upon receipt of complaint); *Kauffman v. Allied Signal*, 970 F.2d 178 (6th Cir.), *cert. denied*, 113 S. Ct. 831 (1992) (same); *Scherer v. Rockwell Int'l*, 975 F.2d 356 (7th Cir. 1992); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984) (same); *Giordano v. William Paterson College of New Jersey*, 60 Empl. Prac. Dec. (CCH) ¶ 41,899 (D.N.J. 1992).

Must an Employer Do to Avoid Liability for 'Hostile Work Environment' Sexual Harassment", 8 *The Labor Lawyer*, 181, 195-199 (1992); Ken Jennings and Melissa Clapp, "A Managerial Tightrope: Balancing Harassed and Harassing Employees' Rights in Sexual Discrimination Cases," *Labor Law Journal*, December 1989, 756, 763.

Under these circumstances, the employer's only legitimate choice is to take effective action to halt the harassment, and let the chips fall where they may. Unfortunately, that employer's reward for its commendable endeavor may be lengthy and costly litigation. Employees who have been disciplined for harassment may claim that the employer's reason is libelous, slanderous, defamatory, or a pretext for discrimination based on the employee's race or age, for example.

For example, in *Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466 (11th Cir. 1991), the plaintiff contended that he was discharged because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 612 *et seq.* He established a *prima facie* case by showing that he was a member of the protected class, was replaced by one considerably younger, and was qualified for the job. *Id.* at 1469-70. The employer countered that Elrod was fired because he had sexually harassed female employees. *Id.* at 1470.

In such a case, the employer can rebut the presumption created by the plaintiff's *prima facie* case by explaining that it discharged the plaintiff for engaging in sexual harassment.[14] The employer is not

[14] In any "disparate treatment" employment discrimination case, for example, an employer rebuts a plaintiff's *prima facie*

required to *prove* a sexual harassment case in order to defend against a discrimination claim.[15] As the Eleventh Circuit explained in *Elrod*:

> Much of Elrod's proof at trial centered around whether Elrod was in fact guilty of the sexual harassment allegations leveled at him by his former co-workers. We can assume for purposes of this opinion that the complaining employees interviewed by [the company investigator] were lying through their teeth. The inquiry of the ADEA is limited to whether [company officials] *believed* that Elrod was guilty of harassment, and if so, whether this belief was the reason behind Elrod's discharge.

939 F.2d at 1470 (citations omitted) (emphasis in original). *See also Waggoner v. City of Garland*, 61 Fair Empl. Prac. Cas. (BNA) 889, 892 (5th Cir. 1993).

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case of discrimination by articulating a legitimate, nondiscriminatory business reason for the challenged employment action. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

[15] *Crimm v. Missouri Pac. R.R. Co.*, 750 F.2d 703 (8th Cir. 1984). "What is critical is whether or not the defendant employer in good faith believed plaintiff to be engaged in conduct which was inappropriate in the workplace." *French v. Mead Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 635, 641 (S.D. Ohio 1983), *aff'd without opinion*, 758 F.2d 652 (4th Cir.), *cert. denied*, 474 U.S. 820 (1985) (employer's basis for terminating Title VII plaintiffs was not pretextual). *See also Johnson v. International Minerals and Chem. Corp.*, 40 Fair Empl. Prac. Cas. (BNA) 1651 (D.S.D. 1986) (granting motion for summary judgment on claims of wrongful discharge, breach of employment agreement, defamation, and intentional infliction of emotional distress by supervisors discharged for sexual harassment after investigation).

Accordingly, an employer's good faith, *i.e.*, a reasonable belief that an employee engaged in sexual harassment, is sufficient to establish a legitimate, nondiscriminatory reason for taking disciplinary action, and rebut the plaintiff's *prima facie* case of discrimination.

Frequently, when a well-communicated anti-harassment policy and accessible procedure are in place, the employer will learn about inappropriate behavior in the early stages, before it crosses the threshold of actionable sexual harassment. Observing the EEOC's admonition that "[a]n employer should take all steps necessary to prevent sexual harassment from occurring," 29 C.F.R. § 1604.11(f), these employers will take immediate, appropriate action regardless of whether the conduct is offensive enough to constitute a Title VII violation. It would make no sense to require employers—or victims—to wait until the conduct escalated to an abusive level before taking steps to stop it.

Indeed, if the employer did so, the victim unquestionably could argue that the employer had knowledge of this "hostile environment" and failed to act. "An employer is not required to tolerate the disruption and inefficiencies caused by a hostile workplace environment until the wrongdoer has so clearly violated the law that the victims are sure to prevail in a Title VII action." *Carosella v. United States Postal Service*, 816 F.2d 638, 643 (Fed. Cir. 1987). For example, in *Johnson v. Perkins Restraurants, Inc.*, 815 F.2d 1220 (8th Cir. 1987), the Eighth Circuit upheld the lower court's dismissal of the ADEA claim of a service technician who was fired almost instantly for

violating explicit company policy against sexual harassment and kissing a sixteen-year-old waitress, even though company policy required progressive discipline where appropriate.

Courts in other types of suits have given considerable latitude to employers acting in response to sexual harassment. For example, in a wrongful discharge case where a foreman was discharged for sexual harassment, the Tenth Circuit found the public policy opposing sexual harassment relevant to contract law, stating:

> Public policy also affects our construction of this contract claim. Here, public policy operates to require a construction of contract terms in favor of giving the employer broad discretion in its efforts to eliminate sexual harassment from the workplace. In this area of judicially created contracts and contract rights, it is perfectly consistent to impose a rule of contract construction which favors the enforcement of a workplace free from offensive sexual conduct.

Williams v. Maremont Corp., 875 F.2d 1476, 1485 (10th Cir. 1989). Similarly, the Fifth Circuit has held that the public policy against sexual harassment supports a qualified privilege, and a presumption of good faith, overcoming a claim for libel and slander arising out of a management bulletin published after an employee was discharged for sexual harassment. *Garziano v. E.I. Du Pont De Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987). *Accord Stockley v. AT&T Info. Sys., Inc.*, 687 F. Supp. 764, 769 (E.D.N.Y. 1988) ("communications made in connection with *bona fide* title VII investigations are protected by a qualified privilege" in a defamation suit by an offending employee)[16]; *DiSilva v. Polaroid Corp.*, No. 8828 (N.D. Mass. App. Div. January 4, 1985).

An employer who responds swiftly and effectively, yet fairly, to allegations of sexual harassment should not have to act at its peril when it discharges the offending employee. Also, at no time should the employer be required to prove the victim's sexual harassment case, let alone that the alleged victim suffered psychological damage. The employer's decision to discipline or discharge a known sexual harasser is more than a simple legitimate, nondiscriminatory business reason. The employer's actions further sound public policy, in addition to meeting a significant legal obligation placed on employers by Congress and the courts to protect the rights of innocent victims. If an employer's investigation produces a good faith belief that inappropriate conduct has occurred, and the employer takes disciplinary action, that action should be given special deference when it is later challenged by the offender.[17]

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[16] The court adopted the position advocated by the EEOC as *amicus curiae*. *Brief of the Equal Employment Opportunity Commission as Amicus Curiae In Support of Defendant's Motion For Summary Judgment, Stockley v. AT & T Info. Sys., Inc.*, No. 86 Civ. 1643 (RJD) (E.D.N.Y.).

[17] Likewise, an employer who conducts a complete investigation and reaches a well-supported, reasonable judgment that sexual harassment has not occurred, and thus takes no action against the accused employee, should not be liable if additional facts are revealed through discovery that might alter the employer's conclusion.

CONCLUSION

For the reasons set forth above, the Equal Employment Advisory Council respectfully submits that the decision of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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